IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 800 of 2000

Hon'ble MR.JUSTICE M.R.CALLA
and
Hon'ble MR.JUSTICE R.R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MOHINI WD/O DR ASHOK DETAGIR BAWA

Versus

KHEEMCHAND PRITAMDAS KRISHNANI

Appearance:
MR GIRISH D BHATT for Petitioner
MR RS SANJANWALA for Respondent Nos.1 and 2.
Ms.Harsha Devani, ASSTT PUBLIC PROSECUTOR for Respondents nos.3 to 5.

CORAM : MR.JUSTICE M.R.CALLA
and
MR.JUSTICE R.R.TRIPATHI

Date of decision: 17/10/2000

ORAL JUDGEMENT (Per : MR.JUSTICE M.R.CALLA)

This Special Criminal Application in the nature of habeas corpus was filed on 4.9.2000 by the petitioner, i.e. mother of the boy named Hrishikesh whose date of birth is 5.10.1987. The petitioner has come up with the case that she had married Dr.Ashok Detagir Bawa on 13.12.1985 at Ahmedabad and out of this

wedlock, a male child was born on 5.10.1987, who was named as Hrishikesh. Said boy, Hrishikesh was admitted in Lower KG in 1990 at Ahmedabad and he continued his studies at St. Xavier's, Sardar Nagar Hansol, Ahmedabad till 1996. In the meantime on 12.8.1994, unfortunately, the petitioner's husband met with an accident and died accidental death. It is also the case of the petitioner that she is an educated lady and is serving with Orient Insurance Company Ltd. It is also her case that she has been serving with the said Company since June 1995. She was promoted as Senior Assistant and was posted at Daman. Thereafter, she was transferred to Idar and then to Himmatnagar. Some time in June 1999 she was transferred back to Ahmedabad and at present she is working as Senior Assistant in the Oriental Insurance Company Ltd and drawing a salary of Rs.13,000/- per month. It is her case that respondent no.1, namely, Shri Khemchand Pritamdas Krishnani, is elder brother of her deceased husband and respondent no.2-Smt.Indu is the wife of said Shri Khemchand Pritamdas Krishnani. Being close relatives they used to come to Ahmedabad and used to pay social visits to the petitioner and her minor son, Hrishikesh. The respondent couple has no issue. The petitioner states that in July 1996, respondents nos.1 and 2 came to Ahmedabad and took the boy Hrishikesh with them to Mumbai for a visit by saying that they would send him back. Having taken Hrishikesh to Mumbai they got him admitted in a school at Mumbai. Since then Hrishikesh has been studying there. It is further the case of the petitioner that she contacted the respondents on several occasions over telephone requesting them to send her minor son Hrishikesh back to her, they evaded and avoided to do so on one pretext or the other including the say that they were looking after minor Hrishikesh, because the petitioner was posted outside Ahmedabad and that they would return her minor son when she is retransferred to Ahmedabad. The petitioner has also raised a grievance that her son came to Ahmedabad in December 1999 to meet her, but he was taken back by respondents nos.1 and 2 to Mumbai and thereafter they did not allow minor Hrishikesh to come and stay with her at Ahmedabad. She has then referred to telephonic talk which she had with the respondents on 30th May 2000. According to the petitioner the respondents had promised her to return the boy at Jaipur and accordingly the petitioner went to Jaipur at her brother's residence, but respondent no.1 sent a telegram expressing his inability to send the boy on the pretext of the minor injuries sustained by minor Hrishikesh. The petitioner addressed a letter to respondents nos.1 and 2 on 23rd June 2000 to send minor Hrishikesh to her,

but to no avail. In August 2000, respondents nos.1 and 2 had taken away Hrishikesh from the petitioner's house at Ahmedabad and have detained him unlawfully.

2. In these circumstances, the petitioner filed the present petition. In response to rule issued by this Court, Mr.R.S. Sanjanwala appeared on behalf of respondents nos.1 and 2. Respondent no.1 has filed an affidavit in reply dated 19.9.2000 stating therein that the first terminal examination of Standard VIII of Master Hrishikesh is in progress and will end on 20.9.2000 as certified by St. Gregorios High School vide certificate dated 16.9.2000 and that he was willing to send the boy to his mother and comply with the directions of the Court, if any, in this regard, but in case Master Hrishikesh is brought to Ahmedabad in the midst of the session and terminal examination, it would affect his studies and performance in the examination. It has been stated that Master Hrishikesh has been staying with him for the last four years and studying at Mumbai. It was undertaken that Master Hrishikesh will be brought to Ahmedabad on any date after 20.9.2000. In para 5 (i) of the affidavit in reply, respondent no.1 has stated that the present petitioner is wife of former's younger brother Dr.Ashok Pritamdas Krishnani. But he has further stated that prior to their marriage his younger brother Dr.Ashok P. Krishnani was adopted by Shri Detagir Mirchigir Bawa and accordingly his name was changed from Dr.Ashok Pritamdas Krishnani to Ashok Detagir Bawa and a public notice to that effect was issued by him in Gujarat Government Gazette, Part II dated 25.8.1969. Respondent no.1 has admitted the factum of marriage between the petitioner and his younger brother Dr.Ashok on 13.12.1985 in accordance with the Hindu rites and that they had resided together in matrimonial home at Ahmedabad. It is also admitted that out of this wedlock a male child, Master Hrishikesh was born on 5.10.1987. After the age of 3 years, Master Hrishikesh was admitted in Lower KG in St. Xavier's High School, Sardar Nagar Hansol, Ahmedabad. The factum of death of Dr.Ashok on 12.8.1994 has also been admitted and it has been stated that the present petitioner and her son are the only heirs. It has been then stated that the petitioner and Master Hrishikesh were residing alone at Ahmedabad and respondent no.2, i.e Smt. Indu, wife of respondent no.1 often used to visit in order to continue relations and to give them company to reduce the loneliness of the petitioner and the child. In para 5 (vi) of the affidavit in reply it has been stated that the petitioner was promoted and transferred to Idar some time in June 1995. She used to leave for her job early

in the morning from Ahmedabad for Idar and return therefrom to Ahmedabad late in the night. It is also stated that the child (Hrishikesh) used to go to school in the morning and return therefrom at about 1.00 PM and that elder brother of respondent no.1, residing in the neighbourhood, used to keep Master Hrishikesh, where Master Hrishikesh used to take his lunch and dinner. In these circumstances, respondent no.1 says that he had put a proposal to the petitioner that Master Hrishikesh, who was then 8 years old, could stay with respondents nos.1 and 2 at Mumbai and pursue his education at Mumbai. The petitioner had agreed to this proposal says respondent no.1. Respondent no.1 goes on to say that in mid July 1996, the petitioner's mother had expired at Jaipur. Respondent no.2 had gone to Jaipur to attend obsequial ceremony at Jaipur and while the petitioner was at Jaipur, she requested the respondent to take Master Hrishikesh to Mumbai and obtain admission for his studies at Mumbai. Respondent no.1 further says that the petitioner herself had applied for and obtained School Leaving Certificate from St. Xavier's High School so as to enable respondent no.1 to get admission for Master Hrishikesh in any school at Mumbai and then only Hrishikesh came to Mumbai on or about 30th July 1996 from Jaipur along with respondent no.2. Master Hrishikesh was admitted in St. Gregarious High School, Chembur, Mumbai, which had I.C.S.E. syllabus in 1996 and he has been studying for four years at the said school and has been pursuing his academic career excellently and at present he is studying in Standard VIII. It has been stated that Master Hrishikesh is being provided the best possible education and is being very well looked after for his needs in the family environment in order to make him a responsible citizen. Copies of merit certificate awarded to the boy during the last four years by the said school and other institutions have been enclosed. It has been categorically stated that Master Hrishikesh has not been kept at Mumbai against his will as alleged by the petitioner and that respondents nos.1 and 2 are taking best possible care in imparting best possible education to him and that at no point of time they had detained him in their house against his wish and desire. The petitioner's allegation that the respondents had brainwashed and mentally indoctrinated Master Hrishikesh in a manner favourable to them, has been denied. It has been then stated in the reply that the respondents shall abide by and submit to the orders of this Court and they are ready and willing to bring Master Hrishikesh before the Court on any date as may be directed by the Court.

3. Accordingly, Master Hrishikesh, aged 13 years, studying in Standard VIII at St.Gregorios High School, Mumbai was produced before the Court today on 17th October 2000. At the request of learned counsel for respondents nos.1 and 2, the matter was taken up for some time in the chamber. From the answers which were given by Master Hrishikesh to the questions put by us, we are satisfied that the boy is being very well looked after by respondents nos.1 and 2 and his education is also being taken care of by them. He (Hrishikesh) also stated that sometimes he does miss his mother and has been casually visiting his mother for a few days, but he stated that for the purpose of studies he thinks that Mumbai is better for him. Respondent no.1 was also present in the chamber. Therefore, we find that the minor boy is not being kept under unlawful custody and that he is not being kept at Mumbai against his wishes.

4. Although we find that the boy is being well looked after, the question is that Master Hrishikesh is a minor himself. This petition of habeas corpus having been filed by his mother, who is the only natural guardian after the death of father of the boy, the question which arises for our consideration is as to whether the custody of the minor boy has to be with the natural guardian (mother) or with the deceased father's elder brother and his wife. There cannot be any lis so far as the guardianship is concerned between the mother and the father's elder brother and the elder brother's wife. The natural mother is the natural guardian and she has full rights to take the custody and keep her son with her. We have ascertained the wishes of the boy, who is inclined to continue to live with the respondent couple, but in such cases when the concerned child is minor, he is not capable of giving consent either way and the paramount consideration in such cases is the welfare of the child as a matter of substance.

5. Therefore, we find that even if the boy is not wrongfully confined, the question of custody can be considered in the petition of habeas corpus. This Court can certainly exercise its jurisdiction of Parens patriae in the writ of habeas corpus. The jurisdiction of Parens patriae is an inherent jurisdiction of the Court which is not circumscribed by any statutory limits. The facts of the present case are peculiar, rather strange in which there is no lis about the custody of the minor child between father and mother; father is no more and the choice is to be made whether the minor child should remain with his mother or with his deceased father's elder brother and his wife (Taau

and Taai, who too have no issue) with whom he is living for past few years and studying at Mumbai and is being well looked after to the extent that even at the cost of missing his mother he is inclined to continue to live with them. For the reasons like this should we say that the paramount interest of the minor child lies in his continuance with the respondent couple? Our answer is NO. The petitioner's status as a natural mother, her quest for the company of her son, the fact that she is fully equipped with resources to take care of the studies and career of the minor child and the fact that there cannot be any substitute for mother's love, care, affection, protection and attention, that mother by itself means a security for the child, relatives and others may give up or abandon, but mother would not, are the reasons which must prevail to tilt the balance in favour of the mother even in the facts of the present case. Master Hrishikesh having lived with his Taau and Taai with comfort may have developed some attachment with them, but that cannot be a determinative factor to decide the question of his paramount welfare. With mother's love and care his personality may develop much more in comparison to the same while living with the respondent couple and there is no reason to deprive the mother of her right to shape the future of her own son. In a Full Bench decision rendered by the Kerala High Court in the case of Margarate Maria Pulparampil Nee Feldman v. Dr. Chacko Pulparampil and others, reported in AIR 1970 Kerala 1, in a little different context, in the end of para 25 at page 12 while quoting a passage of an eminent jurist from Bailey on Habeas Corpus, Vol.I, page 581, it was observed as under:

"A mother's protection for such children is indispensable. We cannot think of any other protection which will be equal in measure and substance to that of the mother in such circumstances. We cannot help referring to the eloquent passage of a jurist;

"The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretense of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the

> vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate."

6. In the case of Dr. Mrs Veena Kapoor v. Varinder Kumar Kapoor, reported in AIR 1982 SC 792, there was a lis between the father and mother with regard to custody of the minor child. The petitioner Dr. Mrs. Veena Kapoor and her husband, the respondent in that case were not living together and after their estrangement, their child Akhil Ishwar was in the custody of the respondent, i.e. the father of the child. The mother filed a petition of habeas corpus in the High Court of Punjab & Haryana asking for the custody of the child alleging that the respondent was in illegal custody of the child. The petition was dismissed by the High Court and therefore, the matter came up before the Supreme Court by way of Special Leave to Appeal. The Supreme Court observed that it was well settled that in the matters concerning the custody of the minor children the paramount consideration is of the welfare of the minor and not legal rights of this or that particular party. It was further observed by the Supreme Court that the High Court without adverting to the aspect of the welfare of the minor child dismissed the petition on the narrow ground that the custody of the child with the respondent cannot be said to be illegal. The Supreme Court observed that it was difficult for the Court in the writ of habeas corpus to take evidence without which the question as to what is in the interest of the child cannot satisfactorily be determined and issued appropriate directions to the District Judge, Chandigarh in this regard on the question of handing over custody of the child to the petitioner-mother.

7. In the case of Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu and another, reported in AIR 1984 SC 1224 also it was held that welfare of minor son would be served by handing over custody to mother. In para 9 of the said judgement it was observed that even the provisions of Hindu Minority and Guardianship Act, 1956 which constitute father as a natural guardian of a minor

cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. In yet another case decided by the Supreme Court in the case of Poonam Datta v. Krishanlal Datta & others, reported in 1989 Suppl. (1) SCC 587, the parties were directed to consider the interest of the child as paramount and do nothing which would be adverse to its interest or affect it physically or mentally in any manner. In the facts of this case, which were considered by the Supreme Court, mother had filed a petition of parens patriae alleging that her minor son, Vaibhav Datta was being detained by respondents nos.1 to 3. The petition was summarily dismissed by the High Court. When the matter came up before the Supreme Court, the respondents appeared before the Court. Several orders were made by the Supreme Court with a view to bring about a settlement between the parties, but the same did not work. In that case also the minor's father had died and the mother was living separately from her in-laws had filed the petition. Vaibhav is the son born to Mr.Amar Jyoti Datta and Poonam and the respondent in that case was in Defence Service and settled down at Karnal in Haryana State after retirement and in these facts directions were issued to the parties to consider the interest of the child as a paramount.

8. In all these cases to which we have made reference, lis was between father and mother of the minor child of tender age. However, the facts of the present case are quite unusual in the sense that here the question is as to whether the minor child of 13 years of age should remain with the mother or with his TAAU and TAAI, after the death of his father. Even if the case of respondents nos.1 and 2 is accepted on its face value, the right of the mother as a guardian cannot be defeated. It is rather unfortunate that a widowed lady has to stand deprived of the company of her son also, forever merely because at one stage under compulsion and force of circumstances she had agreed that her son may live with his Taau and Taai for some time. It has to be agreed on all counts that she must be missing the company of her son adding to her agony and loneliness as a widowed lady. The child has also stated that he too misses his mother at times. His thinking that Mumbai is a better place for his studies cannot be decisive for his welfare. Be that as it may, keeping in view the welfare of the child himself, even if it is taken that the boy had been sent to Mumbai for his studies with his Taau and Taai, that is for the reason that the petitioner at that time being a woman, was to remain away from home for a considerably longer

time for attending her duties, now that mother is back to home at Ahmedabad and she is in a position to devote much more time to her minor son and as compared to Mumbai, equally adequate facilities are available at Ahmedabad also, the custody of the child has to be with his mother. There is no status above the status of the mother so far as the child is concerned. In the present case there is no conflict between father and mother and it is only a dispute without any issue as we find that respondents nos.1 and 2 are equally interested in the welfare of the child, but the child being a minor, if the mother wants to keep the boy with her, no one can come in the way of the custody of the minor child with the mother. In any case, the welfare of the child has to be kept in view as a paramount consideration and therefore, we do not find that any direction is required to be issued for the purpose of the custody of the child to the mother immediately at this stage during the middle of the academic session. We rather think it appropriate to direct and we hereby direct that respondents nos.1 and 2 would hand over the custody of the minor son, Hrishikesh to the petitioner immediately after his annual examination of Standard VIII are over, which are scheduled to be held some time in March 2001, along with all his academic records and School Leaving Certificate, etc. so as to enable the petitioner to get his admission in some equally good educational institution at Ahmedabad. We may also mention to the credit of respondent no.1, who candidly stated before us that he would not come in the mother's way and after the boy's present academic session in March 2001 is over, the boy Hrishikesh will be handed over to her mother and he has also stated before us that in winter break, i.e. Christmas vacation, the boy Hrishikesh will be sent to his mother for the entire period of winter break and of course, he expressed his regrets that at present during break from 22.10.2000 to 5.11.2000, the boy cannot be sent to Ahmedabad to her mother because he has to attend a Quiz competition at Bangalore.

9. This petition is accordingly allowed in the terms as aforesaid and it is directed that after annual examinations of the boy, Hrishikesh are over in March 2001, respondents nos.1 and 2 shall send him to his mother- the petitioner herein with all his academic records and School Leaving Certificate, etc. as directed above. Rule is made absolute accordingly.

(M.R. Calla, J.)

17th October 2000 (Ravi R. Tripathi, J.)

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